Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1179

THE RUTLAND ENVIRONMENTAL PROTECTION ASSOCIATION, an unincorporated association; FERDINAND RIEDL; EVELYN RIEDL; FRANKLIN SCHNEIDER; MABEL SCHNEIDER; EVERETT McLEAN; NANCY McLEAN; RAYMOND EBERHARDT; MARILYN EBERHARDT; DAVID KOSMEN; MURIEL KOSMEN; FRED LEMON and JOAN LEMON, both individually and as members of the Rutland Environmental Protection Association,

Petitioners,

vs.

KANE COUNTY, an Illinois political subdivision; VERNON DRENDEL; SHIRLEY A. DRENDEL; FRED H. AHRENS; FLORENCE M. AHRENS; JOHNSON FARMS, INC., an Illinois corporation; CITIZENS BANK & TRUST COMPANY, as Trustee under Trust Number 66-2028; EMIL HOMEYER; ELSIE HOMEYER; CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust Number 34644; JOHN TURES; HUGH L. MOORE; and FAMILY LEISURE CENTERS, INC., an Illinois corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutory Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Petition for Writ of Certiorari	9

I.

The Peoples' Right to Notice By Means Other Than Mere Publication of Proposed Zoning Changes Which May Radically Affect Their Property Is An Important Constitutional Question Which Should Be Promptly and Definitively Resolved By This Court — 9

A. The Illinois Statutory Notice Requirement, Ill. Rev. Stat., ch. 24, Sec. 3158, and the Illinois Appellate Court's Interpretation of Its Conflict With Recent Decisions of This Court — 9

B. This Court's Resolution of the Question of the Adequacy of Notice By Mere Publication of Proposed Zoning Amendments Will Affect No Less Than 33 State Statutes Which Now Require No Better Notice Than Notice By a Single Publication — 15

II.

A Single Publication of a Notice of a Zoning Board of Appeals Hearing "To Consider General Amendments" and "Minor Changes" in the County Zoning Ordinance Was Insufficient to Meet Due Process Standards for Sufficiency and Specificity Where the Amendments Involved Drastic Alterations to the Community Unit District Classification and Were Admittedly Designed to Accommodate the Project to Which Petitioners were Objecting .. 16

Conclusion 19

Appendices:

A. Opinion of the Illinois Appellate Court For Second Judicial District 1a

B. Order of Illinois Supreme Court Denying Leave to Appeal 9a

C. Compilation of State Statutes Governing Notice of Zoning Amendment Hearings 10a

D. Full Text of Ill. Rev. Stat., Ch. 34, Sec. 3158 ..... 14a

E. Text of Notice of Hearing on Amendments to Kane County Community Unit District Classification 15a

Table Of Authorities

Cases

Brachfeld v. Sforza, 114 N.Y.S. 2d 722 (1959) 18

Federal Building and Development Corporation v. Town of Jamestown, 312 A.2d 586 (R.I. 1973) 18

Glaspey & Sons, Inc. v. Conrad, 521 P.2d 1173 (Wash. 1974) 18

Hein v. Daly City, 332 P.2d 120 (Cal. 1958) 18

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 311 (1949) 5, 9, 10, 11, 12, 15, 18

Robinson v. Hanrahan, 409 U.S. 38 (1972) 5, 12, 15

Trifaro v. Zoning Board of Appeals, 342 N.Y.S.2d 95 (1973) 18

Walker v. Hutchinson, 352 U.S. 112 (1956) 5, 12, 13

Statutes

Ill. Rev. Stat., Ch. 34, Sec. 3158 ..... 4, 5, 9

Ill. Rev. Stat., Ch. 24, Sec. 11-13-7 ..... 13, 14, 15

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court for the Second Judicial District entered in this case on August 13, 1974.

OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 31 Ill. App. 3d 82, and is reproduced herein as Appendix A. The decision of the Illinois Supreme Court denying Plaintiffs' leave to appeal is reported at 61 Ill. 2d 428, and is reproduced herein as Appendix B.

JURISDICTION

Issues involving the due process clause of the Fourteenth Amendment to the United States Constitution are herein presented. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I.

WHETHER AN ILLINOIS STATUTE PERMITTING NOTICE BY PUBLICATION OF HEARINGS RELATING TO PROPOSED AMENDMENTS TO COMPREHENSIVE ZONING ORDINANCES VIOLATES THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHERE THE NAMES AND ADDRESSES OF THE INTERESTED PARTIES ARE KNOWN TO THE PARTY SEEKING TO GIVE NOTICE.

II.

WHETHER NOTICE OF A HEARING TO CONSIDER THE REVISION OF A PARTICULAR ZONING CLASSIFICATION WHICH WAS ADMITTEDLY DESIGNED TO ACCOMMODATE A SINGLE DEVELOPER WAS SUFFICIENTLY SPECIFIC TO SATISFY DUE PROCESS NOTICE REQUIREMENTS WHERE THE NOTICE REFERRED ONLY TO "GENERAL AMENDMENTS" AND "OTHER MINOR CHANGES" WITHOUT ANY REFERENCE TO THE CLASSIFICATION WHICH WAS BEING AMENDED OR THE LOCATION OF THE PROPERTY AFFECTED.

STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat., Ch. 34, Sec. 3158

Amendments of Regulations and Districts. The regulations imposed and the districts created under authority of this Act may be amended from time to time by ordinance or resolution after the ordinance or resolution establishing same have gone into effect, but no such amendment shall be made without a hearing before the Board of Appeals. At least fifteen days' notice shall be published in an official paper of general circulation in such county . . . (Full text of statute is reproduced as Appendix D).

STATEMENT OF THE CASE

The petitioners filed suit to set aside two amendments to the comprehensive zoning ordinance of Kane County, Illinois, the cumulative effect of which was to create a special zoning classification for a single developer and to rezone approximately 1000 acres of the developer's land under the new classification. Petitioners' complaint alleged that both amendments were enacted without affording petitioners adequate notice or an opportunity to be heard at public hearings which preceded their enactment. The petitioners further alleged that the Illinois statute, (Ill. Rev. Stat., Ch. 34, Sec. 3158) permitting notice by mere publication was contrary to the requirement of the due process clause where the identity and location of interested parties were known or easily ascertainable.

The case was tried to the Court sitting without a jury. At the conclusion of all of the evidence, the Trial Court held that as a matter of law the notice by publication statute was constitutionally adequate and that the notice given by publication was sufficiently specific to satisfy due process requirements.

The Illinois Appellate Court for the Second District affirmed the Trial Court, stating that the notices given met the minimum requirements of the Illinois statute and that this statute had been expressly approved by the Illinois Supreme Court (Appendix A. at 4a). The Illinois Appellate Court refused to apply or even consider this Court's controlling decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 311 (1949); *Walker v. Hutchinson*, 352 U.S. 112 (1956); and *Robinson v. Hanrahan*, 409 U.S. 38 (1972).

The Illinois Supreme Court denied leave to appeal on November 24, 1975.

The facts relevant to this Petition are essentially undisputed. In the summer of 1973, the developer, Family Leisure Centers, Inc., hereinafter FLC, acquired approximately 1000 acres of farm land in Rutland Township and announced its intention to construct an amusement park of the size and type of that known as Disneyland in California (A. 95, 96)* The individual plaintiffs, all property owners in the immediate vicinity of the proposed project, became alarmed and commenced a series of inquiries, both in person and by telephone, to various county officials about the park.

No less than six personal requests for information were made to the county officials during the succeeding five months. (A. 97, 98, 99, 179, 181-183, 185) Plaintiffs were told on each occasion that no information on the project was available. (A. 185) On one occasion plaintiff Schneider, left his name and address with the County Zoning Officer so he could be notified when information was available. (A. 185)

At the time plaintiffs were being told by the county that no information was available, county officials were conducting almost daily negotiations with FLC on all aspects of the proposal.[1] These negotiations carried on

[1] The official minutes of the Kane County Development Committee, Plaintiffs' Exhibit 10, reflect that the amusement park project was discussed at no less than 11 of the 12 regular meetings during the months of August, September and October. In addition to the regular meetings, two special meetings dealing exclusively with the park were held. Further, members of the staff and the County Board were flown to the developer's existing parks in Cincinnati, Ohio and Kings Dominion, Virginia for inspection tours. (A. 224-25) And finally, the record contains voluminous plans, reports, technical data and engineering studies, all of which were in the county's files at the very times the staff personnel were telling the plaintiffs that no information was available. (See plaintiffs' Exhibits 27, 30, 31, 32, 33, 35, 42, 44.)

* Denotes Appellate Court abstract.

by the County's Development Committee and its staff, involved not only the physical aspects of the developer's plan, but also basic changes in the County's Community Unit Development (C.U.D.) zoning classification, changes which the County ultimately agreed to make as an accommodation to this particular development. (Plaintiffs' Exhibit No. 10)

Indeed, by late summer the staff was working so closely with the developer that one member of the Board of Supervisors who had questioned the wisdom of the proposal was also denied information on the park. (A. 436-37)

Nothing, however, demonstrates the closeness of the relationship between the developer and the County better than the County's actions in proposing and passing six amendments to the C.U.D. classification for the sole purpose of permitting FLC to develop under that particular classification. These amendments were admitted by county officials to have been made exclusively for the benefit of FLC. (A. 875) The purpose and effect of these amendments were to remove all residential requirements from the C.U.D. classification and permit FLC to develop under the C.U.D. District.[2].

The notice of the hearing on these amendments was published a single time in a daily newspaper. No direct notice was given to any of the plaintiffs, who both FLC

[2] The original Kane County C.U.D. ordinance envisioned a planned community type development and required exact percentages of residential as opposed to commercial uses. FLC made known its desire to develop the park under the C.U.D. classification but, because it planned no residential uses, the classification had to be amended. The county staff accommodatingly proposed and guided the passage of 6 amendments which systematically deleted every reference to residential requirements from the C.U.D. ordinance. Within one day of the amendments' passage, FLC filed its petition for the new C.U.D. zoning. (A. 879)

and the County well knew by this time would have been acutely interested in such a hearing.

In addition, the published notice was, petitioners urge, wholly inadequate to satisfy the due process requirement that a notice contain sufficient information to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The published notice read:

> "Public Notice is hereby given to all persons concerned that a public meeting will be held . . . to consider general amendments to the Kane County Zoning Ordinance, including changes and additions to sections concerning Residential Districts and other minor changes." (Pl. Ex. No. 58).

The notice not only failed to refer to the classification being amended, it being the C.U.D. District and not a "Residential District", but also failed to refer to the only property which would be directly affected by the amendment.

The petitioners also challenged the notice of the Zoning Board of Appeals hearing on FLC's petition to rezone its property from farming to C.U.D. This notice was also given by a single publication in a daily newspaper. No direct notice, personal or by mail, was given to any of the plaintiffs. Some, but not all, of the plaintiffs learned of the hearing and attended it. The earliest any of the plaintiffs learned of the hearing was three days prior to the hearing date. As a result of the failure of notice, neither the individual plaintiffs nor the association had time to prepare for the hearing or retain legal counsel to represent them. (A. 107)

It is undisputed that the names and addresses of the individual plaintiffs as adjacent and nearby landowners were available and easily ascertainable from the County's plat book and tax records.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE RIGHT TO NOTICE OF HEARINGS ON PROPOSED ZONING AMENDMENTS BY MEANS MORE LIKELY TO REACH AND INFORM AFFECTED PARTIES THAN NOTICE BY PUBLICATION IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THE COURT.

A.

The Illinois Statutory Notice Requirements, Ill. Rev. Stat., Ch. 34, Sec. 3158, And The Illinois Courts' Interpretation Of It, Conflict With Recent Decisions Of The Court.

Although the constitutionality of giving notice by mere publication when the names and addresses of the parties for whom notice was intended were known to the person giving the notice was presented to the Illinois trial, appellate and supreme courts, each chose to ignore this Court's controlling decisions and affirmed without discussion, the Illinois notice statute.[3] Ironically, the Appellate Court, while refusing to require it, recognized the need for "more definitive notice", saying:

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[3] The Illinois Appellate Court rejected this Court's holding in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 311 (1949) and its progeny when it summarily disposed of the notice issue stating:

> "Plaintiffs assert that notice by publication instead of personal notice, is insufficient, as previously stated, the published notice complied with the statutory requirements of notice pertinent to proposed amendments in general ordinances. The notice was constitutionally adequate and defendants were not in this instance required to serve personal notice." Appendix "A" at P. 3.

> "Despite our holdings on the matters of notice, we empathize with plaintiffs' position that, under circumstances here present, more definitive or additional notice should be required." (Appendix "A" at P. 5)

This Court has on these occasions stated unequivocably that more definitive notice not only "should be" but *is* required where the identity and whereabouts of the parties for whom the notice is intended are known or ascertainable. In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 311 (1949) this Court held that notice by publication was constitutionally adequate *only* where mailing or personal service cannot be affected because the identity and whereabouts of the parties to be notified are unknown.

Mr. Justice Jackson, writing for a unanimous court in *Mullane*, set forth the basic due process requirement for adequate notice:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the (person for whom the notice is intended) might reasonably adopt to accomplish it." *Mullane, supra* at 873.

In *Mullane* this Court recognized the inadequacy of notice by publication and expressly condemned its use except where it is "not substantially less likely to bring

home notice than other of the feasible and customary substitutes."[4]

The Illinois Notice statute and the Appellate Court's opinion in this case fly directly in the face of the clear mandate of this court:

> Exceptions in the name of necessity do not sweep away the rule that within limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency . . . The statutory notice (by publication) is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However, it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication . . . Publication may theoretically be available for all

[4] The inadequacy of notice by publication was expressly recognized in *Mullane:*

> "It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint. *Mullane, supra,* at 874.

> the world to see, but it is too much in our day to suppose that each or any individual . . . does or could examine all that is published to see if something may be tucked away in it that affects the property interests. *We have before indicated in reference to notice by publication that "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."* (citation omitted) *Mullane, supra* at 875-76.

This is not the first time the Illinois courts have ignored the *Mullane* decision and upheld a statute permitting notice by publication. In *Robinson v. Hanrahan*, 409 U.S. 38 (1972), this court struck down a notice by publication provision which had been approved by the Illinois Supreme Court. This court reversed the Illinois court in *Robinson*, holding:

> "An elementary and fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *More specifically, Mullane held that notice by publication is not sufficient with respect to an individual whose name and address are known or easily ascertainable.*" (emphasis added)

The availability of the information necessary to afford more definitive notice requires that some form of notice other than mere publication be given. The same sources of information were available to defendants in this case as were available to the defendant in *Walker v. Hutchinson*, 352 U.S. 112 (1956). In *Walker*, Mr. Justice Black struck down a Kansas statute which permitted notice solely by publication because the Appellant's name was known to the City and was ascertainable from the City's official records.

"Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirement of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane, we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. *In the present case, there seems no compelling reason or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the City and was on the official records.* Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value. (emphasis added) *Walker, supra* at 182.

The availability of such information was recognized by the Illinois Legislature when it passed a statute requiring that notices of hearings for variances in the City of Chicago be published *and* served either personally or by registered mail on all property owners within 250 feet in each direction from the subject property.[5]

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[5] Illinois Revised Statutes, Ch. 24, Sec. 11-13-7 provides in pertinent part:

Ill. Rev. Stat. Ch. 24, Sec. 11-13-7 Variations—Special uses—Notice to Record Owner.

"In addition to the notice requirements otherwise provided for in this Division 13, in municipalities of 500,000 or more population, an application for variation or special use shall, not more than 30 days before filing an application for variation or special use with the board of appeals, serve written notice, either in person or by registered mail, return receipt requested, on the owners, as recorded in the office of the recorder of deeds or the registrar of titles of the county in which the property is located and as appears from the authentic tax records of such county, of all property within 250 feet in each direction of the location for which the variation or special use is requested; provided, the number of feet occupied

(Footnote continued on following page)

[5] *Continued*
by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement. The notice herein required shall contain the address of the location for which the variation or special use is requested, a brief statement of the nature of the requested variation or special use, the name and address of the legal and beneficial owner of the property for which the variation or special use is requested, a statement that the applicant intends to file an application for variation or special use and the approximate date on which the application will be filed. If, after a bona fide effort to determine such address by the applicant for variation or special use, the owner of the property on which the notice is served cannot be found at his last known address, or the mailed notice is returned because the owner cannot be found at the last known address, the notice requirements of this subsection shall be deemed satisfied. In addition to serving the notice herein required, at the time of filing application for variation or special use, the applicant shall furnish to the board of appeals a complete list containing the names and last known addresses of the owners of the property required to be served, the method of service and the names and addresses of the persons so served. The applicant shall also furnish a written statement certifying that he has complied with the requirements of this sub-section. The board of appeals shall hear no application for variation or special use unless the applicant for variation or special use furnishes the list and certificate herein required. The board of appeals shall, not more than 30 days nor less than 15 days before the hearing at which the application for variation or special use is to be considered, send written notice to the persons appearing on the list furnished by the applicant, which notice shall contain the time and place of the hearing, the address of the location for which the variation or special use is requested and the name and address of the applicant for variation or special use and a brief statement of the nature of the variation or special use requested.

Any property owner within the aforesaid 250 feet notice requirement, who entered his appearance and objected at the board of appeals hearing, and who shows that his property will be substantially affected by the outcome of the decision of the board, may, without proof of any specific, special, or unique damages to himself or his property or any adverse effect upon his property from the proposed variation or special use appeal from any order, decision or decree of the

(Footnote continued on following page)

In this case, like *Mullane*, *Robinson* and *Walker*, there is no compelling or persuasive reason why some form of direct notice could not have been given. The Plaintiffs had demonstrated their interest in this proposal by repeatedly, albeit in vain, requesting information. To bring this matter to hearing without affording plaintiffs some form of direct notice effectively stripped the proceedings of the fairness required by the due process clause.

To conform the law of Illinois to the constitutional guidelines for notice enunciated by the Court, the Writ of Certiorari should be granted.

B.

This Court's Resolution Of The Question Of The Adequacy Of Notice By Publication Of Proposed Zoning Amendments Will Affect No Less Than 33 States Whose Statutes Now Require No Better Notice Than Notice By A Single Publication.

Illinois is by no means unique in requiring no more than published notice of proposed zoning changes. No fewer than 33 states permit notice solely by publication. *Sixteen* states require personal service or service by registered mail. One state requires no notice at all.[6]

[5] *Continued*
board of appeals provided such appeal is taken within the statutory period provided for appeals under the Administrative Review Act, approved May 8, 1945 and all amendments and modifications thereof, and the rules adopted pursuant thereto. If the board of appeals determines that the property of any such owner will not be substantially affected by the outcome of the decision of the board, such owner may initiate or join an appeal under the Administrative Review Act, as provided in this Section, in which appeal the owner is entitled to a de novo trial on the issue of whether his property will be substantially affected by the outcome of the decision of the board of appeals, at which time he may present evidence.

[6] Appendix "C" lists the applicable notice requirements of the several states.

It is thus apparent that this Court's decision in *Mullane* and its progeny has been less than universally applied by the several states so far as zoning matters are concerned. The lack of uniformity between the states, together with the clear conflict between the pronouncement of this Court and the practices of 33 states makes this an important case for the exercise of the Writ of Certiorari.

II.

NOTICE OF A HEARING TO CONSIDER AMENDMENTS TO A PARTICULAR ZONING CLASSIFICATION WAS CONSTITUTIONALLY INADEQUATE WHERE IT REFERRED ONLY TO "GENERAL AMENDMENTS" AND "OTHER MINOR CHANGES" WITHOUT REFERENCE TO THE CLASSIFICATION BEING AMENDED OR THE LOCATION OF THE PROPERTY AFFECTED WHERE THE PROPOSED AMENDMENTS WERE DESIGNED TO ACCOMMODATE A SINGLE DEVELOPER.

In order to permit FLC to develop under Kane County's Community Unit Development Classification the ordinance had to be completely redrawn to remove all residential requirements.[7] As FLC's plan contained no residential uses, no less than six amendments to the C.U.D. classification were required to make it available to FLC. These amendments were dutifully proposed by the County Development Committee and passed by the

[7] The former C.U.D. classification required a high percentage of residential uses and permitted only "attendant commercial uses." By its own definition the C.U.D. classification was:

> "An environmental unit intended primarily as a place for residing rather than working, although it may include some light industrial development". (Pl. Ex. No. 39)

County Board. Only FLC stood to benefit from these amendments.[8]

Within one day of the formal adoption of these amendments, FLC filed its petition for rezoning to the new C.U.D. classification.

The formal hearing on the FLC zoning petition was held fifteen days later.

The plaintiffs' interest in the amusement park was well known to both the County and the developer by the time the C.U.D. amendments were proposed. Any action which would affect the development was of paramount concern to these citizens.

In spite of this, the County and the developer elected not to give plaintiffs any direct notice of this crucial hearing and to publish an obscure and meaningless notice. The published notice neither referred to the classification being amended, the location of the property affected nor to the developer for whose benefit the amendments were being made.[9]

This Court has clearly articulated the requirements of due process on the specificity of notice:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them

[8] In proposing the amendments the Kane County Development Committee noted that they were "in connection with the zoning for the Taft Broadcasting Recreation Area" (FLC is a wholly owned subsidiary) and that they would be "temporary measures." (Pl. Ex. No. 10)

[9] The full text of the published notice is reproduced as Appendix E.

> an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information (citation omitted) and it must afford a reasonable time for those interested to make their appearance." *Mullane, supra* at 873.

Notices of "general amendments" have been expressly condemned by numerous states. Jurisdictions which have considered the specificity of notice question, have uniformly held that a notice which fails to warn of the nature of the proposed amendments by making reference to the specific classification being amended, is not adequate notice.[10]

The notice in question could not conceivably have given the plaintiffs notice that these amendments were going to be considered. Due process clearly requires better notice than was given and the failure of notice effectively stripped plaintiffs of their right to participate in a governmental action which vitally affected them. For this reason the Court should grant this petition for a Writ of Certiorari.

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[10] *Federal Building & Development Corp. v. Town of Jamestown*, 312 A. 2d 586 (R.I. 1973); *Hein v. Daly City*, 332 P. 2d 120 (Cal. 1958); *Trifaro v. Zoning Board of Appeals*, 342 N.Y.S. 2d 722 (N.Y. 1973); *Brachfeld v. Sforza*, 114 N.Y.S. 2d 722 (N.Y. 1959); *Glaspey & Sons, Inc. v. Conrad*, 521 P.2d 1173 (Wash. 1974).

CONCLUSION

The amendments to Kane County's comprehensive zoning ordinance here complained of affected a radical change in land use in the area in which the Petitioners live. The development of the proposed amusement park will bring an estimated 2,000,000 people in 750,000 automobiles during the summer months to an area presently devoted to farming and scattered residential development.

Petitioners' own homes valued from $40,000.00 to in excess of $150,000.00 and the proposed development threatens to reduce their value by as much as fifty per cent. (A. 369) So drastic an impact on Petitioner's lives and property requires that they be given an adequate opportunity to prepare the defense of their homes. Unfortunately, Illinois law offers no such opportunity.

Respectfully submitted,

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APPENDIX A

Opinion Of The Appellate Court of Illinois

JUSTICE THOMAS J. MORAN delivered the opinion of the court.

Plaintiffs appeal the decision of the trial court which upheld the rezoning of certain property in Rutland Township, Kane County, Illinois, from F-1 Farming, to Community Unit District (CUD). The new zoning will permit the construction of a proposed 1000-acre amusement park by defendant, Family Leisure Centers, Inc. (FLC). Plaintiffs, owners of property in the vicinity of the proposed park, formed a voluntary association of persons (REPA) opposed to the park's construction.

On appeal, plaintiffs challenge the validity of two ordinances which culminated in the rezoning of the area in question. They attack both ordinances contending that due process requirements of the U.S. and Illinois constitutions as to notice were not satisfied by the published notices of hearings. They then assert that the second of the ordinances (that which rezoned the particular property) was invalid because it amounted to contract zoning resulting from negotiations that transpired between county agents and FLC prior to passage of the ordinance. Lastly, they contend, the second ordinance was invalid because various public officials who were responsible for its passage were guilty of an "appearance of impropriety."

The first ordinance under attack is an amendment to the general ordinance. Therein the requirements under the CUD zoning classification were changed from plann-

ed arrangements of residential uses and attendant commercial and industrial uses to allow for the proposed park. Specifically, the amendment deleted the requirement that all districts zoned CUD must contain residences. The notice precedent to hearings on this amendment was published on October 19, 1973. It advised that a public meeting was to be held on November 5, 1973, to consider "general amendments to the Kane County Zoning Ordinance including changes and additions to sections concerning residential districts and other minor changes." The notice also stated that a copy of the proposed amendments was on file for public inspection and gave the address at which the amendments could be examined.

In asserting that the notice of hearing on this amendment is constitutionally defective, plaintiffs argue (1) that the notice was so general, a person seeing the notice would not be adequately apprised of the proposed zoning change, (2) that the notice did not conform to statutory requirements, and (3) the notice was solely by publication.

We first address the claim that the notice was inadequate because it was vague and overly general. The challenged notice explicitly stated that the general zoning classification amendments to be considered would affect residential districts and it designated the location at which the proposed amendments could be examined. The notice was sufficient to alert persons with an interest in residential zoning classifications that a change was to be made in the general ordinance and, with reasonable diligence, such persons could determine whether those changes were matters of concern.

Plaintiffs allege that the statutory provisions for notice were not met in that notice was not given to those affected and the hearing was not held within the township affected. (Ill. Rev. Stat. 1973, ch. 34, § 3158.) The statute requires that at least 15 days prior to hearing, notice of the public meeting must be published in an official paper or in one of general circulation in the affected county. The statute further provides that where general amendments to the basic zoning ordinance are sought, hearing may be conducted in the county court house. Where rezoning of specific parcels is sought, the hearings are to be had within the township affected. In neither case does the statute require that notice other than by publication be given affected persons. Inasmuch as the notice was seeking at this time to generally amend its zoning ordinances the statutory requirements were met; cf. *Bieretz v. Village of Montgomery*, 67 Ill. App. 2d 403, 407 (1966).

Plaintiffs assert that notice by publication, instead of personal notice, is insufficient. As previously stated, the published notice complied with the statutory requirements of notice pertinent to proposed amendments in the general ordinances. The published notice was constitutionally adequate and defendants were not in this instance required to serve personal notice. *Bohan v. Village of Riverside*, 9 Ill. 2d 561, 566 (1956); *Village of Riverwoods v. County of Lake*, 94 Ill.App.2d 320, 326-27 (1968).

The balance of plaintiffs' arguments concern the subsequent amendment of another ordinance which allowed the particular rezoning of the 800 acres to accommodate the proposed park. Notice of the public hearing on the petition to rezone was published on November 12, 1973, in the Elgin Courier News; public hearing was held on November 28. The zoning board voted to recommend ap-

proval of the petition and forwarded its recommendation to the Kane County Board of Supervisors who approved the petition in February of 1974.

Plaintiffs contend that the published notice was insufficient and urge this court to look to the totality of the circumstances to determine whether plaintiffs were afforded adequate notice of hearings under the due process standards. Included in the "circumstances" urged upon this court is plaintiffs' argument that, prior to the passage of the ordinance, the county withheld from plaintiffs information on the nature of the park, and the additional assertion that the single publication of notice for the Board's hearing was a "mere gesture." The trial court found that plaintiffs were fully informed at all stages as plans were being developed for construction of the park, and that plaintiffs appeared regularly at various public meetings where detailed presentations were given. Our review of the record discloses that there was ample evidence to support the trial court's conclusion that plaintiffs were informed on the nature of the proposed park.

Plaintiffs concede that the published notice complied with the requirements of the statute but maintain that, under the circumstances here, that notice was inadequate. This contention is without merit because, as previously stated, published notice which conforms to the statute is legally sufficient. Too, the evidence was undisputed that virtually all REPA members had actual notice of the November 28 zoning board hearing and that most of the named plaintiffs attended. Where, as here, defendants complied with statutory requirements of notice, and plaintiffs had actual notice (many attending the hearing), plaintiffs were in no way deprived of adequate notice.

Plaintiffs' final challenge to the sufficiency of notice on this second ordinance relates to minor amendments made in the ordinance during the February hearing at which it was adopted. This point is raised for the first time on appeal, and because it was never raised for the trial court's consideration, we deem it waived. *Women's Athletic Club of Chicago v. Hulman*, 31 Ill. 2d 449, 454 (1964).

Despite our holdings on the matters of notice, we empathize with plaintiffs' position that, under circumstances here present, more definitive or additional notice should be required. As we are bound by existing law, plaintiffs' grievances would more properly be left to the legislative branch of government.

Plaintiffs allege that the ordinance which rezoned the 800 acres to CUD was the product of negotiations, bargaining, and concessions between FLC and the development committee and that it was therefore invalid as "contract zoning." Cases which plaintiffs cite in support of this assertion are inapplicable here. In those cases, ad hoc conditions or restrictions were attached to existing zoning ordinances, resulting in new zoning classifications not previously contained in the zoning ordinance or comprehensive plan. See e.g., *Andres v. Village of Flossmoor*, 15 Ill. App. 3d 655 (1973); *Cederberg v. City of Rockford*, 8 Ill. App. 3d 984 (1972).

The Kane County ordinance regulating CUD zoning requires discussion and "bargaining" for CUD zoning classification. Thereunder an applicant for CUD zoning must, at an informal conference, submit to the plat officer a sketch plan describing existing conditions of the site and of the proposed development. After the preapplication conference, the plat committee reviews the proposal. Recommendations made by the plat officer

or committee during the initial review may be incorporated into the development plan. After approval of the initial proposal by the plat committee, a detailed development plan is prepared which must include certain specified information, and this plan is then reviewed by the plat officer and committee with approval contingent upon the plan meeting specified criteria. Regulations require that a developer's final plan contain approved provisions for such items as streets, utility easements, water distribution, lighting, and landscaping. It is only after the plat committee has approved the development plan that the applicant may first petition for CUD zoning.

Community unit development is a method of land use control designed to supplement existing master plans and zoning ordinances. It permits combining different land uses on the same tract, is intended to apply to specific property, and meant to facilitate the development of an environmentally sound, and functional unit. Flexibility is the advantage which CUD zoning enjoys over traditional euclidean zoning which divides a community into districts and requires segregated uses. See *Rudderow v. Township Committee of the Tp. of Mt. Laurel*, 121 N.J. Super. 407, 297 A. 2d 583 (1972).

Since the overall aims of CUD zoning cannot be accomplished without negotiations and because conferences are indeed mandated by the regulating ordinance, the conduct of the defendants herein cannot be read as contributing to contract zoning. The very term "contract zoning" is inappropriate to the facts herein. The conduct of FLC and the planning commission was in compliance with the county's ordinance regulating CUD zoning.

Without raising a constitutional question in the trial court or on appeal, plaintiffs here indirectly attack CUB zoning claiming there are no standards. As evident by the foregoing, such a claim is unfounded. The county's ordinance sets forth specifications and requirements as to procedure, design, development and open-space standards. We find the ordinance to contain sufficient standards.

In an amended complaint, plaintiffs contend that the Kane County Development staff's approval of FLC's petition to rezone and the subsequent amendment to the zoning ordinance were products of fraud and deceit. The basis for this allegation was that a member of the Kane County Board of Supervisors was a member of a surveying firm employed by FLC to do surveying work in connection with the amusement park project and that FLC commissioned the services of an engineering firm which it knew was developing the Kane County Master Plan under a long term contract between the county and the firm. We need not concern ourselves with the sufficiency of plaintiffs' allegations because the trial court found "no evidence in the entire record whatever of fraud and deceit. The only evidence presented were accusations by plaintiffs, inferences, inferences upon inferences, innuendo and suggestions in questions addressed to witnesses* * *." From our review we find the trial court's summation correct.

By post trial motion, and again on appeal, plaintiffs argue that in contrast to the traditional standards of proof for fraud, the standard of proof sufficient for invalidating an ordinance is that the conduct of public officials created "an appearance of impropriety" in the mind of the average citizen.

Other jurisdictions have adopted a standard whereby an appearance of impropriety may be sufficient to invalidate a zoning ordinance but the law is clear in Illinois that, absent proof of actual fraud, courts cannot investigate the wisdom or motives of the legislative branch in order to invalidate zoning ordinances. (*Murphy v. C., R.I. & P. Ry. Co.*, 247 Ill. 614, 619 (1910); *Anthony v. City of Kewanee*, 79 Ill. App. 2d 243, 247-48 (1967).) Therefore, where the elements of fraud have not been alleged or proven, this court is without the power to inquire into the motives attendant to the passage of the ordinance in question. See *Anthony v. Kewanee*, supra.

For these reasons, the judgment of the circuit court is affirmed.

Judgment affirmed

RECHENMACHER, P.J., DIXON, J., concur

APPENDIX B

Order Of The Supreme Court Denying Leave To Appeal

OFFICE OF

CLERK OF THE SUPREME COURT

November 24, 1975

Mr. Richard L. Cooper
Attorney at Law
117 S. Second Street
Geneva, Illinois 60134

No. 47950—The Rutland Environmental Protection Association, an unincorporated association; et al., etc., petitioners, vs. Kane County, an Illinois political subdivision; et al., etc., respondents. Leave to appeal, Appellate Court, Second District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

APPENDIX C

Tabulation Of Notice Requirements Of The Several States

Alabama—Code of Alabama (1973); Title 37, § 781
Notice by publication and "due notice" to parties in interest

Alaska—Alaska Statutes (1962); § 29.33.210
Notice by publication and certified mail to interested parties

Arizona—Arizona Rev. Stats. (1956); Ch. 4, § 9-462(c)
Notice by publication

Arkansas—Arkansas Stats. (1947); § 19-2830
Notice by publication

California—West's Ann. Calif. Codes (1964); GOV § 65351
Notice by publication, posting and "in such other manner as may be necessary and desirable"

Colorado—Col. Rev. Stats. (1963); § 106-2-11
Notice by publication

Connecticut—Gen. Stats. of Conn. (1972); § 8-3c
Notice by publication

Delaware—Del. Code Ann. (1972); Title 22, § 326
"Public notice and due notice to the parties in interest"

Florida—Florida Stats. Ann. (1956); § 176.13
"Public notice and due notice to the parties in interest"

Georgia—Code of Ga. Ann. (1967); § 69-814
Notice by publication

Hawaii—Hawaii Rev. Stats. (1968); Title 6, § 46-4
Notice by publication

Idaho—Idaho Code (1948); § 50-1204
Notice by publication

Indiana—Burns Ind. Stats. Ann. (1964); § 18-7-4-48
Notice by publication

Illinois—Ill. Rev. Stats. (1973); Ch. 34, § 3158
Notice by publication

Iowa—Iowa Code Ann. (1946); Title 15, § 414.3
Notice by publication

Kansas—Kansas Stats. Ann. (1973); § 12-708
Notice by publication

Kentucky—Kentucky Rev. Stats. (1970); § 424.130(b)
Notice by publication

Louisiana—La. Stats. Ann. (1952); § 33.4726
Notice by publication

Maine—Maine Rev. Stats. (1965); Title 30; § 4953
No notice required

Maryland—Ann. Code of Maryland (1970); Art. 66B, § 4.04
Notice by publication

Massachusetts—Ann. Laws of Mass. (1974); Ch. 40A, § 207

Michigan—Mich. Stats. Ann. (1969); § 5.2961(9)
Notice by publication plus notice by certified mail to interested parties

Minnesota—Minn. Stats. Ann. (1968); § 394.26
Notice by publication

Mississippi—Miss. Code Ann. (1972); § 17-1-15
Notice by publication

Missouri—Missouri Ann. Stats. (1966); § 64.140
Notice by publication

Montana—Montana Rev. Codes (1947); § 11-3833
Notice by publication

Nebraska—Neb. Rev. Stats. (1970); § 23-164
Notice by publication

Nevada—Nev. Rev. Stats. (1974); Title 22, § 278.260
Notice by publication

New Hampshire—N. H. Rev. Stats. (1970); § 31.63a
Notice by publication

New Jersey—N. J. Stats. Ann. (1967); § 40.55-34
Notice by publication

New Mexico—N. M. Stats. (1953); § 14-2—4
Notice by publication and notice by certified mail to all property owners within 100 feet

New York—N. Y. Stats.; VILL ("village") § 7-728
Notice by publication and posting

North Carolina—N. Car. Gen. Stats. (1974); § 153A-323
Notice by publication

North Dakota—N. D. Century Code (1968); § 40-48-11
Notice by publication

Ohio—Ohio Rev. Code Ann. (1967); § 713.12
Notice by publication

Oklahoma—Okl. Stats. Ann. (1973); Title 19, § 865.58
Notice by publication

Oregon—Oregon Rev. Stats. (1971); § 215.223
Notice by publication and by certified mail to all property owners within 250 feet of property

Pennsylvania—Pa. Stats. Ann. (1961); Title 16, § 2027
Notice by publication

Rhode Island—R. I. Gen. Laws (1956); § 45-24-18
Notice by publication and "due notice to the parties in interest"

South Carolina—S. Car. Code of Laws (1962); § 14-364
Notice by publication

South Dakota—S. D. Compiled Laws (1967) § 11-2-29
Notice by publication and notice to interested parties

Tennessee—Tenn. Code Ann. (1973); § 13-404
Notice by publication

Texas—Texas Stat. Ann. (1963); Art 1011f
Notice by publication and written notice to all property owners within 200 feet

Utah—Utah Code (1953); § 17-27-17
Notice by publication and "due notice" to interested parties

Vermont—Vt. Stats. Ann. (1967); Title 24, § 3011
Notice by publication and "direct mailing" to adjacent property owners

Virginia—Va. Code (1950); § 15.1-431
Notice by publication "written notice" to each abutting property owner or occupant

Washington—Wash. Rev. Code Ann. (1966); § 36.70.590
Notice by publication

West Virginia—W. Va. Code (1969); § 8-24-23
Notice by publication

Wisconsin—Wisc. Stats. Ann. (1973); § 59.97 (2)(b)
Notice by publication

Wyoming—Wyoming Stats. (1957); § 18-283
No notice required

APPENDIX D

Ill. Rev. Stat. Ch. 34 Sec. 3158

Sec. 3158. Amendment of regulations and districts

The regulations imposed and the districts created under the authority of this Act may be amended from time to time by ordinance or resolution, after the ordinance or resolution establishing same has gone into effect, but no such amendments shall be made without a hearing before the board of appeals. At least fifteen days notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such county, and a hearing shall be held in each township or road district affected by the terms of such proposed amendment, except that for the consideration of general amendments to a County zoning ordinance, hearings may be held in the County Court House instead of in each township or road district. In case of written protest against any proposed amendment, signed and acknowledged by the owners of twenty percent of the frontage proposed to be altered, or by the owners of twenty percent of the frontage immediately adjoining or across an alley therefrom, or by the owners of twenty percent of the frontage directly opposite the frontage proposed to be altered, or in cases where the land affected lies within one mile and one-half of the limits of a zoned municipality, by the city council or president and board of trustees of the zoned municipality with limits nearest adjacent, filed with the county clerk, such amendment shall not be passed except by the favorable vote of three-fourths of all the members of the county board. 1935, June 28, Laws 1935, p. 689, sec. 5; 1953, July 6, Laws 1953, p. 857, sec. 1.

APPENDIX E

Notice Of Hearing

STATE OF ILLINOIS
COUNTY OF KANE—SS

TO WHOM IT MAY CONCERN:

Public notice is hereby given to all persons concerned that on the fifth day of November, A. D., 1973, at seven-thirty o'clock (7:30 P.M.) Central Standard Time, in the evening of said day, a public hearing will be held in the Kane County Court House, Room 116, Geneva, Kane County, Illinois, to consider general amendments to the Kane County Zoning Ordinance, including changes, and additions, to sections concerning Residential Districts, and other minor changes. A copy of proposed amendments is on file in the office of Building Permit & Inspection Division of the Kane County Development Department, 427 Campbell Street, Geneva, Illinois, for public inspection. All interested persons are requested to attend said hearing.

KANE COUNTY ZONING BOARD OF APPEALS

/s/ CARL M. CARLSON
Secretary

DATED at Geneva, Illinois
this 19th day of
October, A. D., 1973.

Supreme Court, U. S.
MAR 17 1976

In The

Supreme Court of the United States

October Term, 1975

No. 75-1179

THE RUTLAND ENVIRONMENTAL PROTECTION ASSOCIATION, an unincorporated association; FERDINAND RIEDL; EVELYN RIEDL; FRANKLIN SCHNEIDER; MABEL SCHNEIDER; EVERETT McLEAN; NANCY McLEAN; RAYMOND EBERHARDT; MARILYN EBERHARDT; DAVID KOSMEN; MURIEL KOSMEN; FRED LEMON and JOAN LEMON, both individually and as members of the Rutland Environmental Protection Association,

Petitioners,

vs.

KANE COUNTY, an Illinois political subdivision; VERNON DRENDEL SHIRLEY A. DRENDEL; FRED H. AHRENS; FLORENCE M. AHRENS; JOHNSON FARMS INC., an Illinois corporation; CITIZENS BANK & TRUST COMPANY, as Trustee under Trust Number 66-2028; EMIL HOMEYER; ELSIE HOMEYER; CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust Number 34644; JOHN TURES; HUGH L. MOORE; and FAMILY LEISURE CENTERS, INC., an Illinois corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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TABLE OF CONTENTS

PAGE

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 2

Introduction 2

Plaintiffs Received Both Actual and Statutory Notice of the Zoning Hearing 3

CONCLUSION 10

APPENDIX—Opinion of Trial Court 1a-7a

TABLE OF AUTHORITIES

Cases

Bohan v. Village of Riverside, 9 Ill. 2d 561 (1956) 5

Braden v. Much, 403 Ill. 507 (1949) 5

Cugini v. Chiaradio, 189 A. 2d 798 (R.I. 1963) 3, 4

F. P. Plaza, Inc. v. Waite, 196 S.E. 2d 141 (Ga. 1973) *cert. den.*, 414 U.S. 825 5

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (distinguished) 5

Passero v. Zoning Commission of the Town of Norwalk, 235 A. 2d 660, 662 (Conn. 1967) *cert. den.*, 390 U.S. 1004 (1968) 9

Perrier v. Board of Appeals, 134 A. 2d 141 (R.I. 1957) .. 3

Robinson v. Hanrahan, 409 U.S. 38 (1972) (distinguished) 5

Sundance Hills Home Ass'n. v. Board of City Commrs., 534 P. 2d 1212 (Colo. 1975) 3

Village of Riverwoods v. County of Lake, 94 Ill. App. 2d 320 (1968) 5

Walker v. City of Hutchinson, 352 U.S. 112 (1956) (distinguished) 5

Statutes

Ill. Rev. Stats. Ch. 24 §11-13-7 7

Ill. Rev. Stats. Ch. 34 §3158 4

Ill. Rev. Stats. Ch. 100 §9 7

Other Authorities

3 Anderson, *American Law of Zoning*, §16.23 (1968) 3-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1179

THE RUTLAND ENVIRONMENTAL PROTECTION ASSOCIATION, an unincorporated association; FERDINAND RIEDL; EVELYN RIEDL; FRANKLIN SCHNEIDER; MABEL SCHNEIDER; EVERETT McLEAN; NANCY McLEAN; RAYMOND EBERHARDT; MARILYN EBERHARDT; DAVID KOSMEN; MURIEL KOSMEN; FRED LEMON and JOAN LEMON, both individually and as members of the Rutland Environmental Protection Association,

Petitioners,

vs.

KANE COUNTY, an Illinois political subdivision; VERNON DRENDEL; SHIRLEY A. DRENDEL; FRED H. AHRENS; FLORENCE M. AHRENS; JOHNSON FARMS, INC., an Illinois corporation; CITIZENS BANK & TRUST COMPANY, as Trustee under Trust Number 66-2028; EMIL HOMEYER; ELSIE HOMEYER; CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust Number 34644; JOHN TURES; HUGH L. MOORE; and FAMILY LEISURE CENTERS, INC., an Illinois corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Introduction

Plaintiff petitioners have characterized this as a case involving questions of law based on "essentially undisputed" facts (Pl. Pet. 6).

On the contrary, the findings of fact made by the Trial Court (Judge Alfred Y. Kirkland), and unanimously affirmed by the Illinois Appellate Court, were determinative of the notice issue presented.

Specifically, the trial and appellate courts found that:

1) All plaintiffs had actual prior notice of the hearing on the zoning amendment involved (Tr. Ct. Op. Appx. 6a*; App. Ct. Op. Pl. Appx. 4a**);

2) All plaintiffs were actually present at the zoning board hearing except those who for personal reasons chose not to attend (Tr. Ct. Op. Appx. 6a; App. Ct. Op. Pl. Appx. 4a);

3) No objections to the proposed amendment were voiced by plaintiffs at said hearing nor were any requests for a continuance submitted (Tr. Ct. Op. Appx. 6a);

4) Plaintiffs were not denied information on the park, but instead were "fully informed at all stages and appeared regularly at various public meetings where

* Appendix to this Response.
** Appendix to Plaintiffs' Petition For Writ of Certiorari.

detailed presentations were given and all questions answered" (Tr. Ct. Op. Appx. 4a; App. Ct. Op. Pl. Appx. 4a);

5) Plaintiffs with the aid of legal counsel and other professional assistance were able to secure two postponements of the vote on the instant zoning amendment and lobby intensively against passage of the amendment for over two months (Tr. Ct. Op. Appx. 3a-5a);

6) Finally, the ordinance was passed by a 23-1 vote of the Kane County Board of Supervisors (Tr. Ct. Op. Appx. 4a).

On these facts, the trial and appellate courts correctly held that plaintiffs were not denied due process and the Illinois Supreme Court denied plaintiffs' petition for leave to appeal.

PLAINTIFFS RECEIVED BOTH ACTUAL AND STATUTORY NOTICE OF THE ZONING HEARING

Plaintiffs' own uncontradicted testimony (A. 117-119) established that all plaintiffs had actual prior notice of the hearing on the instant zoning amendment and that all plaintiffs were actually present at the hearing except those who for personal reasons chose not to attend (A. 117-119, 534). As the trial and appellate courts recognized, plaintiffs can hardly claim lack of due process when the notice challenged actually did what it was supposed to do and they actually knew about and attended the hearing at issue (App. Ct. Op. Pl. Appx. 4a; Tr. Ct. Op. Appx. 6a).

See, e.g., *Sundance Hills Home Ass'n v. Bd. of City Commrs.*, 534 P. 2d 1212 (Colo. 1975); *Perrier v. Board of Appeals*, 134 A. 2d 141 (R.I. 1957); *Cugini v. Chiaradio*, 189 A. 2d 798 (R.I. 1963); 3 Anderson,

American Law of Zoning § 16.23 (1968) and cases cited therein. In *Cugini* the Rhode Island Supreme Court noted at 801:

> "The record here discloses that all of the objectors to the grant of this exception appeared and testified. In such circumstances we are constrained to conclude that they had actual notice of the hearing and that they appeared thereat to make their objections known. *The constitutional question above referred to not having been brought into issue by one whose rights thereunder are alleged to have been violated, the court will not pass upon it.* Newell v. Franklin, 30 R.I. 258, 74 A. 1009." (Emphasis added)

Moreover, plaintiffs concede (Pl. Pet. 9) that the published notice of the zoning board hearing in this case met all the statutory requirements set forth in Ill. Rev. Stats. Ch. 34 § 3158 providing:

> "Amendment of regulations and districts.
> The regulations imposed and the districts created under the authority of this Act may be amended from time to time by ordinance or resolution, after the ordinance or resolution establishing same has gone into effect, but no such amendment shall be made without a hearing before the board of appeals. At least fifteen days notice of the time and place of such hearing shall be published in an official paper or paper of general circulation in such county, and a hearing shall be held in each township or road district affected by the terms of such proposed amendment, except that for the consideration of general amendments to a County zoning ordinance, hearings may be held in the County Court House instead of in each township or road district. . . . 1935 June 28, Laws 1935, p. 689, § 5; 1953, July 6, Laws 1953, p. 857, § 1 — Section 3151 et seq. of this chapter."

This statute has been upheld in at least two prior Illinois Supreme Court decisions,* and reflects the statutory law of all fifty states** and every court decision interpreting said statutes in light of due process. See, e.g., *F. P. Plaza, Inc. v. Waite*, 196 S.E. 2d 141 (Ga. 1973), *cert. den.* 414 U.S. 825, stating (at 144):

> "We hold that such notice by publication of a rezoning hearing to be held by a governing authority of a county is proper and adequate insofar as the requirement of procedural due process and equal protection are concerned. Such notice by publication puts all parties, wherever located, on notice that a public hearing will be held at the stated time and place before the governing authority which is considering an application to rezone land under the jurisdiction of the governing authority. We have held that such notice by publication is all that affected property owners are entitled to, and that their legal or constitutional rights are not violated by the rezoning of property when such notice by publication is given (citation)."

The United States Supreme Court cases cited by plaintiffs (Pl. Pet. 9-13) were not ignored by the trial and appellate courts, they simply do not apply to the facts at bar. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), involved a landowner's right to receive personal notice of proceedings filed to condemn his own property, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), involved published notice to known trust beneficiaries of the judicial settlement of accounts by the trustee of the trust. *Robinson v. Hanrahan*, 409 U.S. 38 (1972), involved notice of vehicle forfeiture sent to a car

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* *Bohan v. Village of Riverside*, 9 Ill. 2d 561 (1956); *Braden v. Much*, 403 Ill. 507 (1949). See also *Village of Riverwoods v. County of Lake*, 94 Ill. App. 2d 320 (1968).

** See Pl. Appx. 10a-13a.

owner's home at a time the state knew he was in jail. In all these cases, the property of the complainant was directly and immediately affected and his identity and whereabouts were well known. Here plaintiffs' property is not directly affected,* expert testimony showed that any indirect effect will be beneficial (A. 513-515), and the members of plaintiff association were not identified until this litigation began.**

More importantly, *Mullane*, *Walker* and *Robinson*, each involved a party who failed to get notice of an event challenging the notice procedures that failed to inform him. *Here all plaintiffs were informed and had actual notice.* Plaintiffs continue to claim that they were denied information about the park (Pl. Pet. 6-7), but the trial judge, who heard and saw the witnesses, expressly found:

> "[E]vidence in the record clearly establishes that Plaintiffs were fully informed at all stages, and appeared regularly at various public meetings where detailed presentations were given and all questions answered. Plaintiffs stayed completely on top of the situation, literally on a day-to-day basis throughout all of the months that work was being done to put the project in final form for official action.
>
> Plaintiffs lobbied intensively with the Board of Supervisors, urging all of them to cast negative votes on the project." (A. 757) (Tr. Ct. Op. Appx. 4a)

* Plaintiffs' assertion that their homes will suffer substantial depreciation (Pl. Pet. 19) was directly contradicted by defendants' expert appraisal testimony (A. 513-515) and plaintiffs did not even argue value diminution in the appellate court, or in their petition for leave to appeal to the Illinois Supreme Court.

** Plaintiff's complaint (Par. 2, Amended Complaint, A. 4) alleged that REPA had a membership of approximately 100 people, but Defs. Ex. 2 (A.E. 378-380) listed only 84 names.

The Appellate Court concurred in this finding stating:

> "Our review of the record disclosed that there was ample evidence to support the trial court's conclusion that Plaintiffs were informed on the nature of the proposed park." (App. Ct. Op. Pl. Appx. 4a)

Other Illinois statutes referred to by plaintiffs (Pl. Pet. 13) requiring a different mode of notice apply to different situations. Obviously, the statutory requirements for notice of zoning variances in the City of Chicago to persons living within 250 feet of the property* and court jurisdiction over nonresident defendants in a lawsuit** are (and should be) different than published notice of an amendment to a county zoning ordinance. Many principal-plaintiffs lived miles away from the property. Many alleged members of plaintiff association were never revealed until the instituting of this litigation. The statement in plaintiffs' Petition that "the names and addresses of the individual plaintiffs as adjacent and nearby landowners were available and easily ascertainable from the County's plat book and tax records" (Pl. Pet. 8) is patently impossible from this record. And to reiterate, plaintiffs' basic claim that they should have received actual notice is academic to this case since as a matter of undisputed fact they did!

As held by the Appellate Court:

> "Where, as here defendants complied with statutory requirements of notice and plaintiffs had actual notice (many attended the hearing), *plaintiffs were in no way deprived of adequate notice*" (App. Op. Pl. Appx. 4a.) (Emphasis added)

* Ill. Rev. Stats. Ch. 24 § 11-13-7.

** Ill. Rev. Stats. Ch. 100 § 9.

Furthermore, the hearing on the prior general amendments of the Kane County zoning ordinance (Pl. Pet. 16) did not rezone the property in question, and took place before the instant rezoning petition was even filed. Publication of the hearing on these amendments was in two newspapers, the *Elgin Courier* and the *Aurora Beacon* (A.E. 329-334), informed where the entire ordinance was available for public inspection, and was neither "obscure" nor "meaningless to these plaintiffs (Pl. Pet. 17). Both the trial and appellate courts correctly held that the duly published notice of hearing on these general amendments met both statutory and due process requirements. (App. Ct. Op. Pl. Appx. 3a; Tr. Ct. Op. Appx. 5a-6a).*

Plaintiffs' assertion that "notice of 'general amendments' have been expressly condemned by numerous states" (Pl. Pet. 18) is not even remotely supported by the cases they cite (Pl. Pet. 18).**

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* Plaintiffs' assertion that "only FLC stood to benefit from these amendments" (Pl. Pet. 17) is not true. The amendment actually made changes in 14 of the County Zoning classifications, including light industry, farming, residential, multi-family and CUD (A.E. 2-13, Pl. Ex. 2) and would apply to all rezoning petitions subsequently submitted, not only FLC's. It was not even felt that the general amendment was necessary for the passage of FLC's petition (A. 328-329).

** *Federal Building and Development Corp. v. Town of Jamestown*, 312 A. 2d 586 (R.I. 1973); *Hein v. Daly City*, 332 P. 2d 120 (Cal. 1958); and *Trifaro v. Zoning Board of Appeals*, 342 N.Y.S. 2d 95 (N.Y. Sup. Ct. 1973) concern the sufficiency of notice of zoning amendments that actually changed the zoning classification of particular tracts of land. In fact, the *Trifaro* case was reversed at 358 N.Y.S. 2d 74 (N.Y. 1974) (town not named party to suit). *Brachfield v. Sforza*, 114 N.Y.S. 2d 722 (N.Y. 1952) established the right to a building permit. *Glaspey & Sons, Inc. v. Conrad*, 521 P. 2d 1173 (Wash.

(Footnote continued on following page)

Directly contrary to plaintiffs' assertion is *Passero v. Zoning Commission of the Town of Norwalk*, 235 A. 2d 660, 662 (Conn. 1967), *cert. den.*, 390 U.S. 1004 (1968) holding that published notice informing that proposed general amendments were on file and could be examined prior to the hearing in the office of the City Clerk were sufficient "fairly to apprise the plaintiffs of the nature and character of the proposed action."

** *Footnote Continued*
1974) held that notice by publication of a proposed amended ordinance was insufficient when it did not inform that the zoning board planned to and did propose substantial amendments of its own that were not described in the notice and were not made available for public inspection.

CONCLUSION

Notice was upheld in this case since: a) all the statutory requirements for published notice of a zoning hearing were fulfilled; b) all plaintiffs, in fact, received actual notice of said hearing; and c) all plaintiffs who chose to attend said hearing did so.

When the published notice produced actual notice and the presence of plaintiffs at the specific zoning hearing in question, the result is neither "unfair" nor violative of due process.

The Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

DECISION OF COURT FOLLOWING TRIAL AND REVIEW OF WRITTEN BRIEFS

This case was tried to the Court without a jury for nine court days, and counsel for both sides were well-prepared. Written briefs and argument following trial consisted of 226 pages in all and reflected long hours of legal research and careful review of evidence adduced during trial.

Preparatory to dictating this opinion, the Court thoroughly reviewed its own extensive notes taken during trial, from opening statements to conclusion of all the evidence. Counsel agreed to waive closing argument and incorporate same in the written briefs.

In reading and studying the extensive briefs, the Court also outlined arguments and authorities submitted by both sides so that all points raised would receive careful consideration. Thereafter the Court checked out authorities cited on issues it believes were material to this decision.

It is the considered opinion of this Court that Plaintiffs have not sustained their burden of proof on any material issue; and particularly as to Plaintiffs' allegations of fraud and deceit, the Court finds that:

1. *Members of the Kane County Board of Zoning Appeals who voted unanimously in favor of the subject proposal were neither the perpetrators nor victims of fraud and deceit.*

2. *Members of the Kane County Board of Supervisors, who voted 23 to 1 in favor of the subject proposal, were neither the perpetrators nor victims of fraud and deceit.*

The Court therefore finds for Defendants and against Plaintiffs on all issues.

Plaintiffs' motion to add additional parties plaintiff is granted.

Plaintiffs heretofore filed a motion to add additional counts to the complaint. If this has not been previously ruled upon, the motion is granted.

No purpose would be served by an opinion here at the trial court level which undertook to cover and discuss all points raised by both sides. Nevertheless, all points raised by both sides were carefully considered and evaluated.

However, some general and specific further comments may be appropriate.

Plaintiffs' reply brief states that "* * * the case, while complicated in its individual aspects, is, we submit, simple in its broad perspective. Reduced to its essentials, this is a due process case. The issue is thus one of 'fundamental fairness.' * * * For each and all of the issues, the Court should step back from the specifics of each and look at the whole cloth that has been woven. To give judicial sanction to the rezoning process, the Court must be satisfied that the Plaintiffs had a 'fundamentally fair' opportunity to participate in the governmental process which affects them so directly." Plaintiffs' reply brief then makes reference, among other things, to "the complicity between developer and officials and agents of the County all being parts of the whole."

The foregoing could be interpreted as an invitation to the Court to base its opinion on overall total impressions rather than specific points of law argued in Plaintiffs' more than 100 pages of original brief and appendages.

Firstly, the Court believes, after complete review and upon reflection, that Plaintiffs were accorded "fundamental fairness." Secondly, the issues in this case were formed by the pleadings, and this case must be decided on the issues formed by the pleadings.

On the allegation of fraud and deceit, Plaintiffs quote from an Illinois Appellate decision as follows:

"The Courts are without power to inquire into the wisdom of an ordinance or the motives which prompted its enactment *with the possible exception that municipal ordinances may be impeached for fraud by persons injuriously affected thereby.*"

This Court does not disagree with the above-quoted language but is unable to find in the entire record any evidence whatever of fraud and deceit. On the basis of this record, accusations by Plaintiffs, inferences, inferences upon inferences, innuendo and suggestions in questions addressed to witnesses are essentially all that is presented to the Court on the issue of fraud and deceit.

It is the Court's recollection that Plaintiffs called to the witness stand, presumably on the issue of fraud and deceit, no less than six Kane County Supervisors—to testify on the charge that one of the Supervisors in some way attempted to pressure the others or persuade them to vote in favor of Defendant Petitioners' proposal. The Supervisor accused, and all the others, testified that he made no attempt to exert pressure on them, influence their vote or suggest what their vote should be.

Testimony and other evidence adduced throughout the trial established that, to the best memory of all concerned, no zoning petition in Kane County history ever received the extensive study and work that this one did.

From first announcement of the project in Kane County, during May of 1973, and continuously until final approval by the Kane County Board of Supervisors on February 19, 1974, there were numerous public meetings to explain the project, answer all questions and receive suggestions. Staff members in the employe of Kane County worked for months with Defendant Petitioners' professionals and technicians—to work out all details for ultimate presentation to the Kane County Board of Zoning Appeals and the Kane County Board of Supervisors.

On November 28, 1973, the Kane County Board of Zoning Appeals unanimously recommended approval of

the project. The matter then went to the Kane County Board of Supervisors for final action. At the Board of Supervisors level, the matter was deferred to a future date on two occasions, one of the principal reasons therefor being that Plaintiff objectors requested further information. This was provided, and the Kane County Board of Supervisors approved the project by a 23 to 1 vote on February 19, 1974.

It is difficult to impossible for this Court to conclude that approval of this project was accomplished or could have been accomplished by claimed fraud and deceit when the Kane County Board of Zoning Appeals unanimously recommended approval after all those months of work and study and when the Kane County Board of Supervisors approved by a 23 to 1 vote after all those months of work and study.

Plaintiffs claim denial of information, denial of notice and inability to obtain adequate information about the project from May, 1973 through February 19, 1974. However, evidence in the record clearly establishes that Plaintiffs were fully informed at all stages and appeared regularly at various public meetings where detailed presentations were given and all questions answered. Plaintiffs stayed completely on top on the situation, literally on a day to day basis, throughout all of the months that work was being done to put the project in final form for official action.

Plaintiffs lobbied intensively with the Board of Supervisors, urging all of them to cast negative votes on the project.

After the Kane County Zoning Board of Appeals unanimously recommended approval of the project on November 28, 1973, Plaintiffs intensified their lobbying campaign to prevent the Kane County Board of Supervisors from accepting the Zoning Board recommendation. Letters opposing the project were directed to the Daily Courier-News of Elgin, Aurora Beacon-News, a

Marengo newspaper, Chicago Tribune and other newspapers, the Illinois Environmental Protection Agency, the United States Department of Health, Education and Welfare, the Illinois Agricultural Association, the Northeast Planning Commission, Governor Walker, several State Senators and State Representatives and the Kane County Board of Supervisors. A professional planner was engaged by Plaintiffs to prepare opposition letters sent to each member of the Kane County Board of Supervisors.

All the above activity is completely proper in every way, but it tends to contradict contentions by Plaintiffs regarding no notice, inadequate notice and denial of information.

Zoning procedures in Kane County are governed by county ordinances, statutes of the State of Illinois and decisions of the Illinois Appellate Court and Illinois Supreme Court dealing with zoning procedures in Illinois. It is this Court's opinion that Defendant Petitioners meticulously followed procedures specified by county ordinances and State of Illinois statutes, and which were approved by higher courts in Illinois where reviewed on appeal.

Plaintiffs contend, however, that the bulk of these procedures which were followed in the instant case are violative of the "due process" clause of the Federal Constitution.

This Court respectfully disagrees with that contention and believes that authorities cited by Plaintiffs in support of their position on "due process" are not applicable to the facts of this case. For example, one case cited regarding notice required on a zoning petition actually involved a fact situation wherein appellant's property was being taken. The matter of legal notice requirements for taking title to an individual's property is obviously quite different than notice required on a zoning hearing.

The Court cannot adopt Plaintiffs' reasoning in challenging legality of notice on the November 28, 1973 meeting of the Kane County Board of Zoning Appeals, nor is it a determinative issue in this case as the Court reads and interprets pertinent Illinois law. It must also be noted that evidence adduced at trial established beyond question that Plaintiffs received actual notice of the Zoning Board hearing, that a substantial number of Plaintiffs appeared at the Zoning Board hearing and that nobody present raised any objection either before or after the Board voted to recommend unanimous approval of the project.

Plaintiffs also assert that the months of work by officials and staff members of Kane County and representatives of Defendant Petitioners in hammering out a suitable proposal—to protect the interests of persons in Rutland Township and Kane County—constituted "contract zoning" and was therefore legally improper. Surely if no such work had been done, Plaintiffs would have complained—justifiably, in this Court's opinion—that the project was approved without the necessary and appropriate preliminary work and study.

In the opinion of this Court the "contract zoning" contention of Plaintiffs has no application to Community Unit Development or Planned Unit Development zoning. The Court is further of the opinion that Plaintiffs have misconceived in other ways the applicability of a "contract zoning" argument to the facts in this case.

Plaintiffs alleged that their organization consisted of 100 persons, but on depositions they only named 43 individuals. There is disagreement as to whether Plaintiffs' organization, Rutland Environmental Protection Association, ever conducted a formal vote or ever authorized this litigation. The Court's recollection of the testimony is that approval was allegedly given at a meeting in one of the Plaintiffs' homes, where attendance was very substantially less than 43 persons. The Court does not suggest that this is a determinative issue in the case. However, the trial record is also clear that

there were many residents in the area of the proposed project who are very much in favor of it.

Argument has been made in the briefs that Plaintiffs have a "no growth" approach to zoning in Kane County, whereas Defendant Kane County has a "managed growth" approach. There is considerable support in the trial record for this characterization of the situation.

The opposition and concerns of Plaintiffs are most certainly recognized by this Court and not regarded lightly.

Surely some of the Plaintiff farmers in the area would have preferred to see it remain always as exclusively farming.

However, other Plaintiffs moved in and built estate class homes in the area—and no doubt feel very strongly that the area should always be confined to farming and estates.

Then other Plaintiffs moved into the area to live in subdivision homes—and no doubt had and have the wish that the area always remain as farming, estates and residential.

The metropolitan Chicago area is expanding westward. Mere existence of the Route 47 and Tollway intersection, and interchange, guarantees more population, development and activity in the area. Again, the Court does appreciate the intense feeling of Plaintiffs in this matter, but the Court is unable to find—in the trial record and in briefs and arguments—any legal support for the position taken by Plaintiffs in this lawsuit.

Respectfully,

/s/ Alfred Y. Kirkland